In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 189

E. B. ENGEL,
Petitioner,
vs.
J. O. DAVENPORT, et al.,
Respondents.

BRIEF ON BEHALF OF RESPONDENT, J. O. DAVENPORT.

EDWARD J. McCUTCHEN,
FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Balfour Building, San Francisco,
Attorneys for Respondent.

Parker Printing Company, 523 Clay Street, San Francisco

Table of Contents

Table of Authorities Cited

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 189

E. B. ENGEL,
Petitioner,
vs.
J. O. DAVENPORT, et al.,
Respondents.

BRIEF ON BEHALF OF RESPONDENT, J. O. DAVENPORT.

STATEMENT OF THE CASE.

This is a suit by a seaman to recover damages for personal injuries suffered by reason of the alleged unseaworthiness of the appliances of the steamship "Davenport". The injury is alleged to have occurred on April 30, 1921. On January 18, 1923, the complaint was filed in the Superior Court of the State of California, in and for the City and County of San Francisco. J. O. Davenport, respondent herein, and one of the co-owners of the

vessel named as defendants, demurred to the complaint upon the ground that the alleged cause of action was barred by the California statute of limitations, section 340, subdivision 3, of the Code of Civil Procedure, which requires actions for personal injuries to be commenced within one year. The demurrer was also general, the contention being that the court was without jurisdiction of the subject-matter, if, as petitioner claimed, the cause of action was based on section 33 of the Merchant Marine Act of 1920 (41 Stats. at L. 988, 1007).

The Superior Court sustained the demurrer. Petitioner did not ask for leave to amend the complaint, but took an appeal to the Supreme Court of the State of California. The latter court affirmed the judgment.

67 *Cal. Dec.* 325.

A petition for rehearing was filed and granted. Thereafter the Supreme Court of the State handed down another opinion affirming the judgment.

Engel v. Davenport, 194 Cal. 344, 228 Pac. 710.

Petitioner then applied to this court for a writ of certiorari, which was granted. The case is now before this court on the merits.

THE ARGUMENT.

The Supreme Court of the State of California held that the alleged cause of action was barred by the provisions of section 340, subdivision 3, of the California Code of

Civil Procedure. Our claim is that the bar of this statute applies equally, whether the complaint affects to state a cause of action under section 33 of the Merchant Marine Act of 1920 (as petitioner maintains) or under the maritime law apart from that statute (as we think).

As we understand the petitioner, he does not claim that the bar of the California statute would not apply if the cause of action is based upon the old rules of the maritime law. Upon that point the law is so well-settled that there can be no argument. His contention is that his action is stated under the Jones Act, (section 33 of the Merchant Marine Act of 1920) and that such action is not subject to the one year limitation of the California statute, but to a two year Federal statute of limitations. He relies on section 6 of the Railway Employers' Liability Act of 1908 (35 Stats. at L. 65), as amended by the Act of April 5, 1910 (36 Stats. at L. 291), which provides, *inter alia* that no action shall be maintained unless commenced within two years from the day the cause of action accrued.

If our position is sound, as we believe we can demonstrate it to be, that the one year bar applies in either situation, the demurrer to the complaint was properly sustained. We, therefore, argue this point first.

If the Court is not disposed to hold with us upon the point, we submit that nevertheless the demurrer was properly sustained because the Superior Court of the State of California is without jurisdiction of an action brought under section 33 of the Merchant Marine Act of 1920.

I.

THE ALLEGED CAUSE OF ACTION IS BARRED BY THE ONE YEAR CALIFORNIA STATUTE OF LIMITATIONS FOR SUITS FOR PERSONAL INJURIES—SECTION 340, SUBDIVISION 3, OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.

A. This Statute is the Controlling Law of the Forum.

The injury alleged in the complaint occurred on April 30, 1921. The complaint was filed on January 18, 1923 (Record p. 1), and thus more than one year after the injury. The alleged cause of action is, therefore, barred by the provisions of section 340, subdivision 3, of the California Code of Civil Procedure. That section requires a suit for personal injuries to be filed within one year.

The cause then is one for the application of the universal rule that the law of the forum controls with reference to the time in which a suit must be filed.

In

Munos v. Southern Pac. Co., 51 Fed. 188, 190,

the court said:

> "Laws limiting the time of bringing suits constitute a part of the *lex fori* of every country; they are laws of administering justice, one of the most sacred of rights."

See, also,

Platt v. Wilmot, 193 U. S. 602, 48 L. Ed. 809, 24 Sup. Ct. 542;

Royal Trust Co. v. MacBean, 168 Cal. 642, 144 Pac. 139;

Wharton on the Conflict of Laws, 3d Ed., Vol. 2, p. 1245;

Story on Conflict of Laws, Sec. 577.

Here the law of the forum is section 340, subdivision 3, of the California Code of Civil Procedure, and because of its terms the alleged cause of action set forth in the complaint is barred.

B. Assuming that the Merchant Marine Act Is Applicable to This Case, the State Statute of Limitations Still Governs; the Jones Act Not Having Incorporated the Limitation Provision of the Federal Railway Act.

The petitioner, however, contends that the California Code is inapplicable because of the provisions of section 6 of the Railway Employers' Liability Act of 1908 (35 Stats. at L. 65, chap. 149), as amended by the Act of April 5, 1910 (36 Stats. at L. 291, chap. 143).

The first paragraph of section 6 of the Railway Employers' Liability Act provides that suits by railway employees engaged in interstate commerce against their employers shall be commenced within two years after the accrual of the cause of action. Attempting to apply the two year limitation of that section, petitioner urges that the present suit is not barred because it was filed within two years after the alleged cause of action accrued.

That section does not by its terms apply to seamen, but petitioner contends that it is applicable to his alleged cause of action by reason of the provisions of section 33 of the Merchant Marine Act of 1920 (41 Stats. at L. 988).

Petitioner's line of thought seems to be this: Section 33 of the Merchant Marine Act of 1920 applies to the cause of action set out in the complaint. The statute purports to provide *inter alia* that seamen may recover dam-

ages for personal injuries resulting from negligence of their employers. (Previously they could have damages only for unseaworthiness of the vessel or defect in her appliances.) The same section of the Merchant Marine Act further provides that in such actions for damages all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees, shall apply. Therefore, every section of every statute of the United States relative to suits by railway employees for personal injuries shall be imported into the maritime law applicable to suits by seamen for personal injuries—including, with special reference to the present case, statutes of limitation and, here, section 6 of the Federal Railway Employers' Liability Act.

Petitioner also argues that to allow state statutes of limitations to apply to causes of action under the Jones Act does violence to the uniformity of the maritime law.

We believe that section 33 of the Merchant Marine Act is inapplicable to cases of injury resulting from unseaworthiness and that the cause of action stated in the complaint is governed exclusively by the general maritime law apart from statute. But even on the assumption that the Jones Act does apply to this case, we think petitioner's argument is untenable. Our answers to his contentions are:

1. That Congress in enacting section 33 of the Merchant Marine Act of 1920 merely changed, at the election of a seaman, the substantive law relating to negligence with the right of trial by jury, and did not adopt or purport to adopt for such cases the two year statute of limitations of the Federal Employers' Liability Act.

2. That there was plainly no intention on the part of Congress to adopt the Railway Employers' Liability Act in entirety for seamen's personal injury cases but merely the provisions defining the nature of and defenses to the right of action thus newly conferred upon seamen.

3. That only those parts of the statutes of the United States "modifying or extending the common-law right or remedy in cases of personal injury to railway employees" are made applicable to seamen's cases under section 33 of the Merchant Marine Act of 1920. Well-settled principles of statutory construction confirm this.

4. That a limitation statute is not a common-law right or remedy.

5. That the argument that the application of state statutes of limitations would interfere with the uniformity of the maritime law is unsound; the rule of uniformity having to do with substantive rights solely, not mere procedural matters.

1. Congress in enacting section 33 of the Merchant Marine Act of 1920 merely changed, at the election of the seaman, the substantive law relating to negligence with the right of trial by jury, and did not adopt or purport to adopt for such cases the two year statute of the Federal Employers' Liability Act.

There is not any language in section 33 making or purporting to make section 6 of the Liability Act applicable to seamen's cases. The latter section deals with questions of procedure only. As to this the situation under the existing laws was not prejudicial to seamen. They were

in the same position as shore employees. The time within which seamen might sue for damages in case of personal injury was adequately covered by existing law. There was in this regard no evil to remove, no prejudice of position to relieve.

But in another regard there was a supposed evil designed to be corrected by the legislation; and when we give attention to this feature of the situation as we should,* the purpose and meaning of section 33 of the Merchant Marine Act become manifest.

Prior to the enactment of section 20 of the Seamen's Act of March 4, 1915, seamen, whether injured with or without negligence, were entitled to wages until the end of the voyage upon which they shipped, and maintenance and cure for a reasonable period of time thereafter. They were entitled to indemnity or damages only if their injuries resulted from unseaworthiness of the vessel or her appliances; or if the master failed to render them medical attention.

The Osceola, 189 U. S. 158; 47 L. Ed. 760, 23 Sup. Ct. 483;

Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. 501.

Congress, believing apparently that there was not any liability in cases of injury to seamen not resulting from

---

*The purpose of a statute is always a proper subject of inquiry in such cases because it usually paves the way to the true meaning of the statute. *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149, 64 L. Ed. 834, 40 Sup. Ct. 438.

unseaworthiness, because of the fellow-servant rule, enacted section 20 of the Seamen's Act of 1915. It provided:

> "That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."
>
> 38 *Stats. at L.*, pp. 1164, 1185.

By this latter section Congress attempted to impose a liability upon shipowners in those cases where the injuries to seamen resulted from the negligence of a seaman in command—a fellow-servant. But, said this court, section 20 of that Act is irrevelant because negligence is immaterial in considering a shipowner's liability in such cases.

Chelentis v. Luckenbach Steamship Co., supra.

So the general maritime law still prevailed.

To meet the last mentioned decision of this court, Congress on June 5, 1920, amended section 20 of the Seamen's Act to read as it now appears in section 33 of the Merchant Marine Act of 1920. That section provides:

> "Section 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:
>
> 'Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such

> seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' "
>
> 41 *Stats. at L.*, pp. 988-1007, chap. 250.

It will be seen that Congress was here conferring upon seamen, at their election, a right of action, which they had not before enjoyed, for damages for personal injuries and was defining that right by reference to the right of action enjoyed by railway employees under the Railway Employers' Liability Act. By reference to the text of that Act (which we print for convenience of reference in the appendix), it will be noted that the rule of *respondeat superior* is made applicable with substantial elimination of the old common-law defenses of the fellow-servant doctrine, assumption of risk, and contributory negligence.

Congress, by section 33 of the Merchant Marine Act of 1920, gave, and plainly meant to give, seamen the right, at their election, of having their causes of action determined by the same principles. So, without re-enacting a separate and necessarily somewhat lengthy statute, it incorporated by reference the statutes of the United States applicable to railway employees which made the rule of *respondeat superior* controlling.

Congress did not provide that any other statute of the United States, or any section of any statute of the United States, which accomplished any other purpose, should be

applicable to seamen's cases under section 33 of the Merchant Marine Act of 1920. Only substantive law in cases of injury resulting from negligence* is dealt with by Congress in that statute.

In view of the plain language of the statute and its history, it is impossible, we respectfully submit, to read into section 33 of the Merchant Marine Act of 1920 any purpose or intention to amend, change or regulate the procedure of the forum where the right is asserted. When the right is asserted, the injured seaman, at his election, may sue in admiralty or on the common-law side of the court. The practice and procedure of each court are different.

Panama Railroad Co. v. Johnson, 264 U. S. 375, 68 L. Ed. 748, 44 Sup. Ct. 391;

American Steamboat Company v. Philip B. Chase, etc., 16 Wall. 522, 21 L. Ed. 369.

2. There was plainly no intention on the part of Congress to adopt the Railway Employers' Liability Act in entirety for seamen's personal injury cases, but merely the provisions defining the nature of and defenses to the right of action thus newly conferred upon seamen.

Section 33 of the Merchant Marine Act provides that all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply to cases of injury to seamen.

---

*As hereinafter pointed out, Section 33 is, we think, inapplicable to cases of injury resulting from unseaworthiness. (pp. 21-25, infra.)

Manifestly that language does not mean that every statute of the United States applicable to railway employees is applicable to such cases. If it did, the Safety Appliance Act of March 2, 1903 (32 Stats. at L. 943, chap. 976), the Boiler Inspection Act of February 17, 1911 (36 Stats. at L. 913, chap. 103), the Hours of Service Act of March 4, 1907 (34 Stats. at L. 1415, chap. 2939), and numerous other statutes and their amendments, with their many provisions inapplicable to vessels and the merchant marine, would necessarily be applicable. If Congress had any such thought in mind it would have said "all statutes of the United States applicable to railway employees" shall be applied. Instead it said:

> "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

It is likewise clear that all of the provisions or sections of the Federal Railway Employers' Liability Act were not made applicable to seamen's cases by section 33 of the Merchant Marine Act. The language of some of the sections shows them to be inapplicable. See, for instance, section 2 (common carriers in the territories, District of Columbia) section 5 (employer's set off of insurance contributions, etc.), section 6 (limitation, venue, concurrent jurisdiction of state courts), section 7 ("common carrier" includes receiver, etc.), and section 8 (saving clause with respect to other Acts, etc.).

It is section 6 of the Act, however, which chiefly concerns us here. That section reads:

"Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

It will be seen that the above section deals with three procedural matters with respect to railway employees' suits, limitation, venue and removal. We think it clear that none of these provisions were incorporated into the maritime law by the Merchant Marine Act.

If Congress intended to make section 6 applicable to suits brought under section 33 of the Merchant Marine Act of 1920, why was any reference made in the latter section to the court where the right should be enforced? That subject was expressly covered by section 6 of the Railway Employers' Liability Act. Under section 6 suits may be filed

"in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

Whereas in suits filed under the provisions of section 33 of the Merchant Marine Act of 1920:

> "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which the principal office is located."

If Congress desired or intended to make section 6 of the Railway Act applicable to cases brought under the Seamen's Act, it would not have uselessly covered the same subject by an additional provision. The latter provision would have been unnecessary. This would be true, even if the provisions of both sections were identical. But, where, as here, they are not alike, but, on the contrary, different from one another, it is clear that the provisions of both sections cannot be applied. It necessarily follows that the provisions of section 33 must control and it likewise becomes manifest that section 6 was not made applicable to seamen's cases.

Section 6 of the Railway Act also provides that no case arising under the Act and brought in any state court may be removed to any court of the United States. Yet suits based upon section 33 of the Merchant Marine Act of 1920 have been removed to and clearly are removable to the Federal court.

Section 28 of the *Judicial Code;*
Malia v. Southern Pac. Co., 293 Fed. 902;
Lorang v. Alaska S. S. Co., 298 Fed. 547;
Caceres v. United States Shipping Board Emergency Fleet Corporation, 299 Fed. 968;
Atianza v. United States Shipping Board Emergency Fleet Corporation, 299 Fed. 975;

Petterson v. Hobbs, Wall & Co., 300 Fed. 811; aff'd 2 F. (2d) 594;

Wenzler v. Robin Line S. S. Co., 277 Fed. 812.

The case last cited, to which we invite special attention, contains a learned and comprehensive discussion of the portions of the Railway Employers' Liability Act which were intended to be made applicable to seamen's cases. Said the court in that case:

> "If the removal statute be in any sense a remedy, as distinguished from a right, it is then the remedy of defendant. But Section 20, in speaking of rights and remedies, is not referring to those of the defendant, but to the rights and remedies of the plaintiff at common law. Upon reading the expression 'modifying or extending the common-law right or remedy in cases of personal injury to railway employees', there is no escape from the impression that the dominant thought in the mind of Congress was a modifying or extending, in certain particulars, of the common-law right or remedy 'cases of personal injury'.
>
> The sections above noted from the Employers' Liability Act regarding assumption of risk and contracts by carriers to exempt themselves from liability constitute modifications of common-law rights or remedies peculiarly appropriate to personal injury cases. But the statute of removal has no more to do with personal injury cases than any other case. The adding to the expression, 'modifying or extending the common-law right or remedy in cases of personal injury', of the further words, 'to railway employees', was rendered necessary by reason of the fact that the desired modification of the common-law rights and remedies for personal injuries was particular or peculiar to railway employees, in that Congress had extended to them alone the advantages of such modification, which benefits it was Congress' desire to

> also confer upon seamen. Hence the reference to railway employees is made to distinguish and point out the law referred to rather than describe or define its scope or nature, or give to the words 'modifying or extending the common-law right or remedy in case of personal injury' any other than the ordinary meaning.
>
> That portion of section 8662 and section 28 denying removal does not modify the common law in cases of personal injuries. It modifies the statute law of removal. To hold that Congress intended to incorporate this provision, it is necessary to find that the statute on removal is a part of a common-law right in case of personal injury. The statute of removal of causes is no part of the common law. It cannot even be said to be either a modification of extension of a common-law right or remedy. It is merely the machinery for getting the case into the right court."

We recognize that there are some decisions, chiefly of the New York district courts, holding to the contrary, but we believe them to be unsound, and submit that there is no answer to the reasoning of the cases cited above, especially to the quotation from Judge Cushman's opinion in the *Wenzler* case.

There is, of course, no more reason for contending that the limitation provision of section 6 was incorporated into the Jones Act than for claiming that the venue and removal provisions were.

3. Only those parts of the statutes of the United States "modifying or extending the common-law right or remedy in cases of personal injury to railway employees" are made applicable to seamen's cases under section 33 of the Merchant Marine Act of 1920. Well settled principles of statutory construction confirm this.

It is to be noted that section 33 of the Merchant Marine Act does not refer to or purport to incorporate or adopt any particular statute of the United States. The Railway Employers' Liability Act of 1908 is not specifically mentioned. In these circumstances and according to well-settled principles of statutory construction only those parts of statutes of the United States which

> "particularly relate to the subject of the adopting statute will be considered as incorporated in the latter in the absence of a clear intention to adopt the whole Act."
>
> 36 *Cyc.* 1152;
>
> *Rex v. Surrey,* 2 T. R. 504; 100 Eng. Rep. R. 271;
>
> *Jones v. Dexter,* 8 Fla. 276;
>
> *State v. Marion County,* 170 Ind. 595; 85 N. E. 513.

Here, of course, the subject of the adopting statute was the modification and extension of the common-law rights and remedies. Thus those portions of the statutes of the United States applicable to railway employees, which modified or extended common-law rights and remedies, *and only those,* were incorporated in or adopted by section 33 of the Merchant Marine Act of 1920. And that is what this court held in

> *Panama Railroad Co. v. Johnson,* 264 U. S. 375; 68 L. Ed. 748, 44 Sup. Ct. 391,

where the court, in commenting on the statutes' adoption of the Railway Employers' Liability Act, said:

> "This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter *all that is fairly covered by the reference.*" (Italics ours.)

And thus we come logically to the point that

4. A limitation statute is not a common-law right or remedy.

The reasoning of the excerpt quoted above from

Wenzler v. Robin Line S. S. Co., 277 Fed. 812,

applies. The California one year statute of limitations for personal injury actions (Code of Civil Procedure, section 340, subdivision 3), which we submit is the controlling law of the forum, is not a common-law right or remedy and is therefore not supplanted by section 6 of the Railway Employers' Liability Act. The California code provision is a creature of the legislature and was unknown to the common law.

Wall v. Robson, 2 Nott & McCord, 498 (S. C.); 10 Am. Dec. 623;

Smith v. Mitchell, Rice's Law 316 (S. C.); 33 Am. Dec. 119;

Cowhick v. Shingle, 5 Wyo. 87; 37 Pac. 689;

Wood on Limitations, 4th Ed., p. 4.

Hence the application of the California code provision is not affected by the language of section 33 of the Merchant Marine Act of 1920, adopting statutes of the United States "modifying or extending the common-law right or

remedy in cases of personal injury to railway employees". Congress in adopting section 33 of the Merchant Marine Act was not, as we have pointed out, altering or attempting to alter, the procedure of the forum but to correct a supposed defect in the substantive law. The procedure which was not touched includes, of course, the limitation statute of the state where the suit, based upon section 33 of the Merchant Marine Act, may be filed.

We frankly do not follow petitioner's argument (petitioner's brief, pp. 6-8) that these words "modifying or extending the common-law right or remedy" are "words of reference" and not "of limitation", and that therefore all parts of every statute dealing with personal injury to railway employees shall apply. This court has already held that the reference is to the Federal Railway Act and that only the portions of it "fairly covered by the reference" are incorporated. We have shown that some parts of the Act from their very nature could not possibly be adopted. Petitioner argues that "every word of a statute must be given effect if possible" (petitioner's brief, p. 7) and then proceeds to give no effect to the words "modifying or extending the common-law right or remedy" by contending that these words are not to be given their natural meaning but are to be interpreted as being descriptive of the *whole* of a statute, all of which could not by any stretch of language be said to modify or extend the common-law right or remedy.

5. The argument that the application of state statutes of limitations would interfere with the uniformity of the maritime law is unsound; the rule of uniformity having to do with substantive rights solely, not mere procedural matters.

Nor is there any merit in petitioner's contention (petitioner's brief, p. 10) that the application of the state statute of limitations is contrary to the well-defined doctrine concerning the necessity of uniformity in maritime matters. The policy of uniformity pertains only to matters of substance and is foreign to procedural questions. In the nature of things it would be impossible, or almost impossible, to make the rules of procedure uniform as applied to suits instituted by seamen. There never has been any uniformity in this respect. Long before the Merchant Marine Act of 1920 was passed, seamen could, and frequently did, sue in a court of law, although their rights were governed by the maritime law. When a seaman did choose to sue in a law court, he was invariably limited by the law of the forum as to the time of bringing suit. The statutes of limitations governing personal injuries vary widely in the states of the union; consequently there was not and could not be any uniformity in this respect prior to the Merchant Marine Act of 1920. Exactly the same situation exists now as was the case before that statute was passed.

Furthermore, there is not and never has been any uniformity in courts of admiralty with respect to the time within which a seaman may bring suit. When there has been an unreasonable delay, laches may be set up as a

defense by respondent, and it is within the discretion of the court, depending on the circumstances, whether the defense will be allowed. Where there are no extraordinary circumstances a court of admiralty will follow the state statute of limitations in all classes of actions.

1 *C. J.*, 1329.

This cannot be deemed to destroy uniformity. The reason for this well-settled rule is admirably set forth in

Davis et al. v. Smokeless Fuel Co., 182 Fed. 1004:

> "The only reason why statutes of limitation are regarded in the admiralty at all is that they furnish a convenient measure of staleness. They represent, or ought to represent, the settled opinion of the community, as to when there should be an end of litigation, * * *."

It is apparent from the foregoing that there is not now nor has there ever been any uniformity with respect to the time of commencement of actions in the state courts, in the law side of the federal courts, or in courts of admiralty.

C. A Seaman Has a Right to Sue In a State Court for Injuries Suffered By Reason of the Unseaworthiness of a Vessel Or Defect in Her Appliances Without Reference to Section 33 of the Merchant Marine Act of 1920; This Is Really Such a Suit and the One Year California Statute of Limitations Undeniably Applies To It.

Thus far we have assumed that the Jones Act is applicable to the cause of action stated in petitioner's complaint. As a matter of fact, however, we think that statute was not intended to and does not cover a case such

as this, and that petitioner's rights depend solely upon the general law as it existed prior to the statute.

Section 33 of the Merchant Marine Act of 1920 does not change or purport to change or abolish the pre-existing maritime law. It merely gives a seaman an election to maintain an action at law or in the admiralty when he has been injured by negligence. Under the maritime law, and despite the provisions of the aforesaid section 33, a seaman may still file a suit in admiralty or in the state or federal court at law to recover indemnity where he is injured by reason of the unseaworthiness of the vessel or her appliances.

The Osceola, supra;

Chelentis v. Luckenbach Steamship Co., supra;

Carlisle Packing Co. v. Sandanger, 259 U. S. 255; 66 L. Ed. 927, 42 Sup. Ct. 475;

Panama Railroad Co. v. Johnson, supra.

In the latter case this court said:

> "Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into that law new laws, drawn from another system, and extend to injured seamen a right to invoke, at their election, *either the relief accorded by the old rules, or that provided by the new rules.*"

In a case brought at the election of the seaman under the old rules, a seaman to recover damages merely has to establish unseaworthiness or defective appliances. Common-law defenses in such cases are not open to a shipowner. The benefit of any statute of the United

States modifying or extending common-law rights and remedies in such cases is unnecessary.

Cricket S. S. Co. v. Parry, 263 Fed. 523;
The Fullerton, 167 Fed. 1.

Section 33 of the Merchant Marine Act of 1920 did not give to or confer upon seamen, injured by reason of unseaworthiness of the vessel or her appliances, any greater rights or remedies than they had or now have under the existing maritime law. This fact emphasizes what we have previously said about section 33 being applicable only to cases of personal injury resulting from negligence (*respondeat superior*) as distinguished from unseaworthiness of the vessel or her appliances.

As stated, a suit for personal injuries based upon unseaworthiness may be filed in a state or Federal court. If the suit is filed in a court of admiralty, the state statute of limitations governs.

Nesbit v. The Amboy, 36 Fed. 925;
Davis v. Smokeless Fuel Co., 196 Fed. 753;
McGrath v. Panama R. Co., 298 Fed. 303;
Brazil v. Matson Navigation Co., 1923 A. M. C. Vol. 1, No. 5, p. 392.

If the suit is filed on the law side of the Federal court, the state statute of limitations is mandatory.

Bonam v. Southern Menhaden Corporation, 284 Fed. 362;
Buckley v. Oceanic S. S. Co., 5 F. (2d) 545;
American Steamboat Company v. Philip B. Chase, 16 Wall. 522; 21 L. Ed. 369;

Michigan Insurance Bank v. Eldred, 130 U. S. 693; 32 L. Ed. 1080, 9 Sup. Ct. 690;

Bauserman v. Blunt, 147 U. S. 647; 37 L. Ed. 316, 13 Sup. Ct. 466;

Campbell v. Haverhill, 155 U. S. 610; 39 L. Ed. 280, 15 Sup. Ct. 217;

E. A. O'Sullivan v. Paul Felix and William W. Stiles, 233 U. S. 318; 58 L. Ed. 980, 34 Sup. Ct. 596.

If the limitation statute of the state governs in the Federal court, it obviously must apply in the courts of the state.

Royal Trust Co. v. MacBean, 168 Cal. 642; 144 Pac. 139.

If, therefore, the present complaint states or purports to state a cause of action under the old rules of the maritime law—that is, because of the unseaworthiness of the vessel or her appliances, it is barred by section 340, subdivision 3, of the Code of Civil Procedure.

A reference to Paragraph V of the complaint, (Record, pp. 2 and 3), shows that the alleged cause of action is based upon the alleged unseaworthiness of the vessel and her appliances. It is therein alleged:

> "That said vessel left said San Francisco on said voyage on or about the 20th day of April, 1921, at which time she was unseaworthy and so continued up to the time plaintiff was injured as hereinafter stated, and the appliances on said vessel were defective in this, that there was on board of said vessel and necessary to be used thereon in carrying said cargo of lumber, an appliance called a chain lashing upon

which chain lashing there was a necessary part thereof a hook called a pelican hook, that during the times herein stated said pelican hook was defective in this, that it had a flaw therein which was observable upon ordinary inspection, but no inspection was made of said hook by defendants or any thereof, and on said 30th day of April, 1921, at said Hoquiam, while plaintiff was as such sailor aforesaid assisting in placing said chain lashing around the upper part of said cargo of lumber on said vessel, the said pelican hook broke by reason of the flaw aforesaid which caused the said chain lashing to spring back and strike the plaintiff's skull and fractured his said skull."

The Supreme Court of the State of California in this case on this point said:

"The present action is based, not upon negligence, but upon the alleged unseaworthiness of the vessel 'Davenport', by reason of a defective pelican hook, and there can be no question but that the State Courts, prior to the enactment of the Merchant Marine Act did have and did exercise jurisdiction in such cases."

194 Cal. 344, 350; 228 Pac. 710, 712.

Thus it seems to us, as we suggested at the outset, and as the Supreme Court of the State of California held, that the present complaint, although pending in the state court, is based upon the old rules of the general maritime law, as to which the state statute of limitations is applicable, and hence it follows that the alleged cause of action is barred by section 340, subdivision 3, of the California Code of Civil Procedure.

II.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA HAD NO JURISDICTION OF THE ALLEGED CAUSE OF ACTION UNDER SECTION 33 OF THE MERCHANT MARINE ACT OF 1920.

We concede that Congress has paramount power to legislate concerning the substantive law* applicable to cases within subject matters vested in it by the Constitution. Such subjects, among others, are interstate commerce and the maritime law. And we further concede that Acts of Congress, upon those subjects, are binding on the state courts. If, therefore, Congress passes an Act within its constitutional powers, suits based upon it may be filed in the state court, unless the Act vests jurisdiction of suits under it in the Federal court exclusively either by express language, *or by implication.*

Upon this subject this court said:

> "* * * where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal Court exclusive jurisdiction. * * * *This jurisdiction is sometimes exclusive by express enactment and sometimes by implication.*" (Italics ours.)
>
> *Chaflin v. Houseman,* 93 U. S. 130; 23 L. Ed. 833.

Our contention here is that Congress plainly indicated an intention to vest jurisdiction of cases, arising under section 33 of the Merchant Marine Act of 1920, *exclusively in the District Court of the United States.*

---

*The limitation upon the power of Congress to deal with the procedure of the courts of the states was expressly recognized by this Court in *Mondou v. New York N. H. & H. R. Co.*, 223 U. S. 1, at p. 57, 56 L. Ed. 327, 32 Sup. Ct. 169.

Congress said in the Act:

> "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

As stated in

Barrington v. Pacific Steamship Co., 282 Fed. 900,

> "the court authorized to entertain jurisdiction of the cause is one specially designated."

The question is, which court is so "specially designated"? Most of the reported cases upon the subject hold that the words——

> "the court of the district"

mean the District Court of the United States.

In

Prieto v. United States Shipping Board Emergency Fleet Corporation, 193 N. Y. S., 342,*

the court said:

> "The words 'the court of the district' are apt to designate a District Court of the United States, but are insufficiently descriptive to be regarded as referring to state courts."

In

Wenzler v. Robin Line S. S. Co., 277 Fed. 812,

the court said:

> "In using the words 'shall be under the court of the district,' etc., Congress doubtless, had mainly in mind the continental United States, comprising the several states. The territory included in a single jurisdiction of a state court may be called a 'district';

*Overruled by *Lynott v. Great Lakes Transit Corporation*, 195 N. Y. S. 13.

but it is not always so designated. It will be noted that the expression is 'court of the district'; the word 'court,' and not 'courts,' is used—that is, the singular and not the plural.

In all of the states, the districts in which courts of the United States sit geographically include or cover the same territory that is covered by the courts of the several states in their exercise of general jurisdiction. If it had been intended by this act alone to confer jurisdiction on the United States District Court, and expressly recognize, at the same time, that of the courts of general jurisdiction of the state in which such district court was held, the word used would not have been 'court,' but doubtless would have been 'courts,' and it would not have been limited to districts, but language would have been used similar to that of subsection J of section 30, already appearing in the act before the above-quoted language of section 33, amending section 20 of the La Follette Act. The language of subsection J inter alia, is:

> '(c) * * * The District Courts of the United States are given jurisdiction (but not to the exclusion of the courts of the several states, territories, districts, or possessions) of suits for the recovery of such damages, irrespective of the amount involved in the suit or the citizenship of the parties thereto. * * *' 41 Stat., p. 1003.

* * * * * * * *

Section 20 of the La Follette Act, as amended (section 33 of the Jones Act) provides that any seaman may, at his election, maintain an action for damages at law; that is, he does not have to sue in the admiralty, but may sue at law in the District Court. If Congress had intended anything else, the language would have been 'may at his election maintain in the state court an action at law.' "

See also

Nox v. United States Shipping Board Emergency Fleet Corporation, 193 N. Y. S. 340.

The subject was again considered by the District Court in

Lorang v. Alaska S. S. Co., et al., 298 Fed. 547,

where, in discussing this particular point, the court said:

> "* * * the provision *fixing jurisdiction in such actions in the court of the district* in which the defendant employer resides, or in which his principal place of business or office is located must be conclusively presumed to be the national District Court. Justice Van Devanter I think so held in The Allianca, supra. He said:
>
> > 'A reading of the provision (section 33) now before us with those sections (24 and 256) * * * makes it reasonably certain that the provision is not intended to affect the *general jurisdiction of the District Courts* as defined in section 24, but only to prescribe the venue for actions brought under the new act of which it is a part.' "

to which we add the following quotation from the decision of this court in

Panama Railroad Co. v. Johnson, supra.

> "* * * the terms of the statute in this regard are not imperative but permissive. It says 'may maintain' an action at law 'with the right of trial by jury,'—the import of which is that the injured seaman is permitted, but not required, *to proceed on the common-law side of the court* with a trial by jury as an incident. The words 'in such action', in the succeeding clause, are all that are troublesome. But we do not regard them as meaning that the seaman may have the benefit of the new rules if he sues

> on the law side of the court, but not if he sues on the admiralty side. * * * In this view the statute leaves the injured seaman free under the general law—Sec. 24 (Par. 3) and 256 (Par. 3) of the Judicial Code—to assert his right of action under the new rules on the admiralty side of the court. On that side the issues will be tried by the court, *but, if he sues on the common-law side* there will be a right of trial by jury." (Italics ours.)

The language last quoted from the opinion of this Court in that case indicates quite clearly that the seaman relying on section 33 of the Merchant Marine Act of 1920 may sue only on the admiralty side or on the common law side of the District Court, and this was the view of the lower court, when it was considering the same point in the *Johnson v. Panama Railroad* case. In discussing the question, that court used this language:

> "The necessary effect of this is to permit a seaman who is a citizen of a state within the district aforesaid and of that district itself to sue, under the statute, in the federal court of the district in question."
>
> 277 Fed. 859.

Congress, it must be conceded, can, within constitutional limitations, give to a seaman additional rights and remedies. It has done so by enacting section 33 of the Merchant Marine Act of 1920. It also must be conceded that Congress can designate the court in which the right so given may be enforced. If, therefore, that section does designate the District Court of the United States, as the court in which rights under it may be enforced, it follows that that court only has jurisdiction of such cases.

Chaflin v. Houseman, supra.

The Superior Court of the State of California is, therefore, without jurisdiction of suits based upon section 33 of the Merchant Marine Act of 1920.

We submit, therefore, that the demurrer was properly sustained on any one of three grounds:

1. If the suit is not under the Jones Act, it is barred by the statute of limitations of the California Code.

2. Even if the Jones Act does apply to such a case as this, it is still barred by the state statute of limitations.

3. If it is brought under the Merchant Marine Act, the state court was without jurisdiction.

Respectfully submitted,

EDWARD J. MCCUTCHEN,
FARNHAM P. GRIFFITHS,
MCCUTCHEN, OLNEY, MANNON & GREENE,
Attorneys for Respondent.

(APPENDIX FOLLOWS)

Appendix.

Appendix

CHAP. 149.—An Act relating to the liability of common carriers by railroad to their employees in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then to the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury

while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any

of its employees, such employees shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

Sec. 7. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled "An Act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employees," approved June eleventh, nineteen hundred and six.

Sec. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.